Filed 1/26/10 In re P.A. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re P.A. et al., Persons Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. E.A., Defendant and Appellant.	A123876 (Sonoma County Super. Ct. Nos. 2606-DEP & 2607-DEP)

In this juvenile dependency case, the mother of the minors did not file a writ petition seeking review of the juvenile court's order terminating reunification services and setting the case for a permanency planning hearing under Welfare and Institutions Code section 366.26[1] (section 366.26 hearing). Then, two weeks before the section 366.26 hearing, the mother filed a petition to modify the juvenile court's order under section 388. At the section 366.26 hearing, the juvenile court denied the section 388 petition and terminated the mother's parental rights.

The mother now appeals, contending that: (1) her counsel in the juvenile court rendered ineffective assistance of counsel by failing to seek writ review of the order setting the section 366.26 hearing; (2) the juvenile court erred in denying her section 388

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

petition without an evidentiary hearing; and (3) the juvenile court erred in terminating her parental rights. We reject all of these contentions, and affirm the juvenile court's order.

FACTS AND PROCEDURAL BACKGROUND

This dependency case involves two half-siblings with a common mother, appellant E.A. (mother), and different fathers.[2] The older sibling, P.A. (brother), was born in the fall of 1999, when mother was 14 years old. The younger sibling, J.A. (sister), was born about four years later, in the fall of 2003.

Mother has a history of substance abuse and mental health problems, as well as some brain impairment resulting in a low IQ. She lived with her mother (grandmother) at the time brother was born, and continued to do so throughout the dependency proceedings, except for the period from September 25, 2007, to January 7, 2008, when mother was in a residential drug treatment program. The family moved eight times between early 2006 and the summer of 2007.

Starting about six months before sister was born, respondent Sonoma County Human Services Department (the Department) opened the first of a series of four voluntary maintenance cases regarding mother and her children (minors). Mother tested positive for methamphetamines when sister was born, and admittedly used methamphetamines throughout her pregnancy. The last of the voluntary maintenance cases was closed on January 30, 2007, because mother failed to participate in the services the Department offered to her, and did not evince any motivation to change.

On March 14, 2007, mother experienced auditory hallucinations of people attacking her family with chain saws, called the police, and was arrested for possession of methamphetamine and drug paraphernalia. Mother was taken to jail, and minors were left at home with grandmother, who asked to be given custody of them.

On April 13, 2007, the Department filed petitions alleging that both minors should be declared dependents under section 300, subdivision (b), on the ground that mother's

[2] The older minor's father is an alleged father; the younger one's is presumed. Neither minor's father could be located; neither was offered reunification services or participated in the dependency proceedings; and neither is a party to this appeal.

substance abuse rendered her unable to provide adequate care and supervision for minors, placing them at a substantial risk of harm. The petition for brother was amended on April 17, 2007, to correct brother's name and add his alleged father's name. Minors remained with mother and grandmother for the time being. The social worker later explained that the Department had been relying on grandmother to safeguard minors, and that over time, grandmother's judgment in this regard appeared to degenerate progressively.

On May 10, 2007, the Department was informed of the results of a psychological evaluation of mother. Her IQ was reported to be very low, with possible brain damage that could have been caused by her methamphetamine use, and also possible schizophrenia. Mother denied any mental illness and had refused to take prescribed medication in the past. The evaluation reported that she had very limited insight and poor judgment, and that treatment would be very problematic because of her evasiveness and inability to reach out to others and to make connections.

On May 29, 2007, the Department filed amended petitions for both minors, adding allegations that mother suffered from developmental delays and mental health issues as well as substance abuse. The amended petitions asserted that mother had refused to undergo drug testing on several occasions in May 2007; had been observed driving under the influence with minors in the car; had failed to comply with the terms of her criminal probation, and had failed to obtain treatment for a rash on sister's face. The amended petition for sister also added allegations of substance abuse as to sister's alleged father. On May 30, 2007, the juvenile court ordered minors detained, and they were removed from mother and grandmother's home and placed in an emergency foster home.

The report prepared for the jurisdictional hearing on June 12, 2007 indicated that mother was not complying with the social worker's recommendations as to services, and that grandmother was also "combative, defensive, and uncooperative with the Department." Mother and grandmother both denied that there were any problems and that mother needed help. The juvenile court entered a jurisdictional order on June 12, 2007.

In the report prepared for the disposition hearing on July 5, 2007, the Department reported that mother had also been having weekly supervised visits, for which she was generally on time, during which she generally behaved appropriately. Mother had repeatedly failed to show up for recommended treatment and counseling, and had missed all but two of her drug tests, although the two she did undergo were both negative. Mother was very resistant to accepting the services offered to her by the Department, and denied that she needed help or was "crazy." The report indicated that mother would need individual therapy, drug testing and treatment (possibly in a dual diagnosis group), a medication evaluation, compliance with prescribed medication, and "very concrete one on one parenting support and instruction." She also needed to resolve pending criminal cases, and follow the conditions of her criminal probation. Brother needed extensive educational help to enable him to catch up after unsuccessfully repeating first grade, and sister needed evaluation for speech and language delays.

The disposition order entered on July 5, 2007 found that mother's progress toward alleviating or mitigation the reasons for minors' detention had been minimal. The court ordered minors detained in their current emergency foster home pending the location of another suitable placement. The court found that placement with grandmother would not be appropriate because of her prior history of neglect of her own children, including mother, but awarded grandmother visitation privileges. Mother was offered reunification services; ordered to comply with the Department's case plan; and notified that reunification services would not extend beyond 12 months from minors' detention, with a possible extension to 18 months at the most, if at 12 months the court found a substantial probability that they would be returned to her custody. About a month after the disposition hearing, on August 10, 2007, minors were placed with mother's aunt (aunt) and aunt's husband (uncle).

The Department's next report was prepared for the six-month review hearing, which was held on December 6, 2007. It indicated that mother "had a difficult time participating in services" due to her mental health problems and developmental delays. She had not kept in touch with the social worker as scheduled. She also had a pattern of

not keeping the community resource worker informed of her appointments for the programs to which she was referred, and then called at the last minute asking for assistance because she could not follow through on the appointments.

Both grandmother and a case manager at mother's treatment facility reported that mother heard voices, but mother denied this. Grandmother and case manager also reported that mother did not always take her anti-psychotic medication consistently as prescribed. Mother also constantly missed appointments with her therapist, showing up for only five out of twelve scheduled sessions. On those occasions when mother did see the therapist, she repeatedly stated that she did not know why she was there. The therapist opined that due to mother's limited cognitive abilities, it was not possible to develop a therapeutic relationship with her, and that it would be difficult for mother to parent minors.

Due to mother's failure to comply with her criminal probation, the criminal court ordered her to participate in a residential treatment program. She spent one weekend there, and was then transferred to a different program at her request. She was doing well in the second program, which had been modified to meet her needs, and was scheduled to complete it on December 27, 2007. In addition, mother had submitted to drug testing as requested, and all of her test results were clean.

However, mother had not complied with the requirement of her juvenile court case plan that she attend at least three weekly Narcotics Anonymous (NA) meetings. She had been discharged from another treatment program, DAAC, due to her lack of attendance and inability to participate properly.

Meanwhile, brother was doing better in school and appeared to be progressing satisfactorily in second grade. Sister was adjusting well to her new preschool, and her ability to vocalize her needs had improved. Both minors were doing extremely well in their new home with aunt and uncle. Mother had supervised visitation with minors regularly on a weekly basis, but had a difficult time setting limits with them, such as making sure brother wore his helmet when riding his bike. She also had trouble dividing her time between them equally, which caused them to act out. She had finally come to

agree that she needed further assistance with parenting, and was referred to an in-home parent educator on November 27, 2007.

At the six-month review hearing on December 6, 2007, the juvenile court again found that reasonable services had been offered to mother, but that she had made minimal progress, and had failed to participate regularly and make substantive progress in the treatment programs and services ordered by the court. The Department's report had recommended that mother receive reunification services for another six months. The court's order advised mother, however, that if minors could not be returned to her by the next review hearing, the Department might set a termination of parental rights hearing under section 366.26.

The Department's report for the 12-month review hearing was prepared in mid-May 2008. Minors were still living with aunt and uncle, in whose custody they had been since the previous August. Brother was doing much better in school since he had begun attending regularly, which he had not done while living with mother. Sister was in preschool, was adjusting well, and was developing on track. Both minors expressed the desire to continue living with aunt and uncle, who had agreed to adopt them if mother could not reunify with them.

Mother completed her residential drug treatment program in January 2008, and graduated to the second phase of the drug dependency court program, which she was consistently attending, and in which she was doing well, remaining clean and sober. She had complied with the requirement that she attend at least three weekly NA meetings; her drug tests had been consistently clean; and the Department was no longer concerned that she was using drugs. She resolved her pending criminal matters and was in compliance with her probation conditions.

Mother had been employed at a fast food restaurant briefly, but quit when her hours were reduced, and was in the process of obtaining job coaching, applying for food stamps and public assistance, and attempting to get a driver's license. Due to her lack of income, mother moved back in with grandmother. She had not been consistent about keeping the social worker informed about her circumstances and the changes in her life,

and her inconsistency in reporting and keeping her appointments for services remained a problem.

Mother was not taking her antipsychotic medication consistently, often seemed confused during her visits with minors, and reported what appeared to be a paranoid delusion in March 2008. Her participation in therapy had been more consistent as far as attending scheduled sessions, but the therapist continued to be unable to develop a therapeutic relationship with mother due to her limited cognitive abilities. The therapist reported that mother was guarded, unfocused, and distracted during the sessions, and kept asking what time it was and when she could leave. The therapist characterized mother as disorganized and unable to distinguish between good and bad feelings and expectations, and also reported that mother made a bizarre remark about time machines.

Mother generally visited with minors weekly as scheduled, but continued to have trouble setting limits and with recognizing and disciplining inappropriate behavior, as well as with dividing her attention equally between brother and sister. The visits still needed to be supervised because of mother's inability to keep both minors safe at the same time. She also made inappropriate comments to them about the possibility that they would be adopted. While the Department commended her for maintaining her sobriety, the social workers remained concerned about her mental health issues, limited insight, poor judgment, and parenting abilities. It, therefore, recommended that reunification services be terminated, and that a section 366.26 hearing be set.

The 12-month review hearing was held on July 1, 2008. Mother was represented by counsel at that hearing, as she had been throughout the dependency proceedings. As of the date of the hearing, mother was still in the process of applying for Social Security benefits, and was still living with grandmother. The Department and mother came to an agreement, under which mother waived the right to a contested hearing, and the Department, although continuing to recommend that reunification services be terminated and a section 366.26 hearing set, nonetheless agreed to provide mother with an additional two months of parent education services during her weekly visitations. The juvenile

court judge questioned mother about the agreement in open court, and she indicated that she understood and agreed to its terms.

In the order filed on the same date as the hearing, the juvenile court accepted the Department's proposed factual findings and its recommendations. The court terminated mother's reunification services, finding that her progress toward alleviating or mitigating the causes underlying minors' dependent status had been inadequate. The court set a section 366.26 hearing, indicating that the likely permanent plan for minors was adoption.

When the juvenile court set the section 366.26 hearing on July 1, 2008, the court advised mother, both in open court and in its written order, that she had to file a writ petition in order to seek appellate review of this decision. No such petition was filed.

After the section 366.26 hearing was set, mother continued to work with the parent educator and to visit with minors. Within a month, however, she failed to attend a number of group meetings required by her dependency drug court program, and missed a drug test. On August 1, 2008, the dependency court found her in contempt, imposed and suspended a brief jail term, and ordered mother to complete 20 hours of community service.

The Department's report for the section 366.36 hearing was prepared in September 2008, although not filed with the court until December 18, 2008. It recommended that mother's parental rights be terminated and that minors be adopted by aunt and uncle, who were very committed to them and wanted to adopt them. It reported that since the termination of services, mother's visits with minors, which were still supervised, had been reduced from the former weekly schedule, first to alternate weeks and then to once a month. Neither minor expressed a desire to have more contact with her.

Aunt and uncle had completed a preliminary adoption assessment, and appeared to be suitable as adoptive parents, with very good parenting skills. Brother and sister both wanted to stay in their care; brother wanted to be adopted by them, and while sister appeared to be too young to understand adoption fully, she said that, "I want to be here . . . it's good, good, good." Both minors appeared to have developed a positive, loving

relationship with aunt and uncle, to the point that removal from their home would be seriously detrimental.

The Department reported that sister was healthy and developing within appropriate limits, and her mental and emotional status were improving. She had made progress in socializing with her peers in preschool and in communicating with her foster parents. She played freely with aunt and uncle's biological children (a 13-year-old girl, a 9-year-old girl, and a 5-year-old boy), had a close connection with brother, and was becoming attached to aunt, as well as to aunt and uncle's teenage daughter. Brother was also healthy and developing normally, and was doing very well in catching up to grade level so that he would be able to advance to third grade the following year. His mental and emotional status were quite good. He was helpful around the house, and enjoyed playing with his sister and with aunt and uncle's three children.

Prior to the section 366.26 hearing, on November 5, 2008, mother stipulated that minors were adoptable, and that potential adoptive parents (aunt and uncle) had been identified. The contested hearing was then set for December 16, 2008.

On December 2, 2008, mother and her counsel prepared and served a JV-180 form, seeking a hearing on a petition under section 388 (section 388 petition) to change the juvenile court's order. Mother reported that she had obtained a full-time job[3]; was attending daily NA meetings and was "compliant with her psychotropic medication regime"; had stable housing with grandmother; and had a support system through social workers, relatives, and friends in NA. She averred that her visits and contacts with minors were continuing to improve, and that she had "incorporated the tools given to her by [her] parenting instructors . . . into her parenting style." Mother asked that minors be returned to her care under family maintenance, contending that sister in particular wanted to return to her, and asserting that because she herself had been a shy child, she was "especially equipped to deal with her daughter's shyness."

[3] At the section 366.26 hearing on December 16, 2008, mother testified that she had started working full time on November 14, 2008.

The Department filed an opposition to the section 388 petition on December 15, 2008, arguing that it did not present evidence of any significant change of circumstances, and did not show that the proposed change would be in minors' best interests. The opposition pointed out that mother's attendance at NA meetings, her reported support system, and her residence with grandmother were already the case when services were terminated, and thus did not constitute changed circumstances. In fact, mother's living with grandmother was actually detrimental to minors, and was one of the problems that had caused them to be removed in the first place. Mother's having obtained a job was laudable, but was not relevant to the reasons her services had been terminated. Despite her reported compliance with her medication regimen, mother still suffered from delusions and was not following the Department's instructions not to visit minors except during her scheduled supervised visitations. Mother remained unable to parent minors independently without supervision. In addition, mother's assertion that sister wanted to return to her care, and that she was particularly well-equipped to deal with sister's shyness, were not corroborated by the Department's reports for the 12-month review and section 366.26 hearings (see *post*).

On December 12, 2008, the Department prepared an addendum report for the section 366.26 hearing. It related that on November 12, 2008, mother had called the Child Abuse Hotline and reported that gang members had gone to aunt and uncle's home and harmed minors. Also, according to aunt, mother told her that brother had told mother that a man had come into the home and hurt him. Interviews with minors revealed that no one had hurt or threatened them, and that they were not afraid of that happening. The visitation supervisor reported that neither mother nor minors had discussed any such occurrence during visits, and aunt and uncle also denied that minors had said anything to them about being scared or threatened. In addition, mother had made an unauthorized and unannounced visit to aunt and uncle's home in late November or early December, and spent half an hour outside in front of the house with minors. As a result of these incidents, the Department remained concerned about mother's mental health issues and her failure to follow the rules governing her visitations with minors.

At the start of the section 366.26 hearing on December 16, 2008, the juvenile court denied the section 388 petition without an evidentiary hearing. The judge found that even though mother was "currently more stable," the "circumstances that justified the termination of services to mother [had] not been resolved"; she therefore had not shown a change of circumstances; and she had made an "insufficient showing even at the low threshold level required . . . that the change would be in the best interest of the children."

At the section 366.26 hearing, mother, through her counsel, requested guardianship rather than termination of parental rights and adoption, so that she could maintain her parental relationship with minors. In her testimony, mother acknowledged that aunt and uncle were taking good care of minors, and indicated that she would like them to stay with aunt and uncle if the court would not return them to her. She expressed her willingness to abide by visitation rules, and averred that as of the date of the hearing, she had been clean and sober for two years. When the court asked mother what specifically she was doing to help sister overcome her shyness, she explained that during their visits at the park, she encouraged sister to go ahead and approach other children and offer to play with them. She admitted that she did not know whether aunt and uncle were also doing the same thing.

The Department's social worker testified that when she last spoke with minors in October 2008, they told her they wanted to continue to live with aunt and uncle. She reported that the visitation supervisor expressed concern that during a recent visit in November 2008, mother appeared not to pick up on sister's cues that she wanted physical affection from mother, and there was also a problem that sister took off running and was not listening to mother. She opined that even though sister appeared to miss mother between visits, both minors saw aunt and uncle as their psychological parents, and wanted to stay with them.

The state adoption worker testified that sister told her that she was happy in aunt and uncle's home, and brother said that he wanted to stay in aunt and uncle's family. The relationship between minors and aunt and uncle's biological children was close and happy. She confirmed that minors looked to aunt and uncle as their parents, sometimes

referring to them as "mom" and "dad," and that they had substantial emotional ties to the family, such that it would be seriously detrimental to remove them.

After hearing this testimony, the judge reaffirmed his decision to deny mother's section 388 petition. In her argument on the section 366.26 issues, mother's counsel conceded that mother had not been able to prove that she had a parental relationship with minors or that it would be in their best interest not to terminate parental rights. She explained that nonetheless, mother wanted to maintain contact with minors, and hoped the court would order legal guardianship, rather than adoption, in recognition of the hard work mother had done. Later in the hearing, the judge explained to mother that she should not initiate contact with minors or aunt and uncle, and should not try to see minors by going to their school. He encouraged the parties to meet with a representative of the Department and other service providers to formulate a plan for how to maintain mother's contact with minors.

At the conclusion of the section 366.26 hearing, the judge found that "[t]he relationship [minors] have with [mother] sounds positive, but it's not beneficial to the point that it outweighs all of the benefits that flow from adoption." In accordance with that finding, the judge terminated mother's parental rights and selected adoption as minors' permanent plan.[4] Mother timely appealed.

DISCUSSION

A. Ineffective Assistance of Counsel in Failing to File Writ Petition

As already noted, mother's counsel in the juvenile court did not file a writ petition seeking review of the termination of reunification services and the setting of the section 366.26 hearing. Mother now argues that this omission constituted ineffective assistance of counsel, requiring reversal of the order terminating her parental rights.

[4] At a brief follow-up hearing on December 18, 2008, the court terminated the parental rights of sister's father as well. At that hearing, mother did not appear, but her counsel thanked the judge for the way he had handled the earlier hearing, and indicated that mother "felt heard."

The Department does not dispute that mother had a statutory and constitutional right not only to the appointment of counsel to represent her in the juvenile court, but also to effective assistance from that counsel. As the Department correctly points out, however, an allegation of ineffective assistance of counsel is not grounds for reversal unless mother can establish that there is a reasonable probability that if her counsel had filed a writ petition, the order setting the section 366.26 hearing would have been overturned. (See *In re David H.* (2008) 165 Cal.App.4th 1626, 1634, fn. 9 [harmless error standard for violation of constitutional right to effective assistance of counsel]); *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252-1253 [harmless error standard for violation of parallel statutory right under § 317.5].)

Mother raises two grounds on which a writ petition could have been granted: (1) the Department's failure to provide mother with reasonable services, and (2) insufficient evidence to support the finding, at the 12-month review stage, that return of the minors to mother would be detrimental. The Department argues, as to both of these grounds, that mother has not met the burden of showing that the outcome of the case would have been different if a timely writ petition had been filed.

1. Failure to Provide Reasonable Services

In April 2007, the Department was informed that mother suffered from mental illness and cognitive impairment. Mother contends that the Department did not provide her with reasonable services in that despite this information, it did not begin to provide her with the one-on-one parenting education services that were required to meet her particular needs until January 2008, only six months before her reunification services were terminated.

In support of this contention, mother argues that the Department's offer of two additional months of parenting education, at the time of the 12-month review hearing, constituted a tacit admission that the services provided up until that time had not been adequate. The factual context defeats this contention, however. The minors' foster parents and likely adoptive parents were mother's close relatives, and mother was going to continue to have visitation with minors at least until the section 366.26 hearing. Thus,

it was clearly in the best interests of minors to maximize the likelihood that mother would be able to handle her future contacts with them appropriately. In that context, we do not view the Department's provision of extra parenting education as an admission that the prior services were inadequate, but rather as an additional accommodation to mother's needs, made in the interest of the minors' well-being and that of the family as a whole.

Mother also relies on *In re Victoria M.* (1989) 207 Cal.App.3d 1317 to support her argument that the services rendered to her were inadequate due to her mental impairment. As the Department points out, however, in that case the social services agency did not refer the mother to a regional center at all, and made no accommodation to the mother's mental limitations when providing her with services. (*Id.* at p. 1329.) Here, in contrast, the Department made a referral to the regional center even before the jurisdictional hearing, but mother was very hesitant to accept it, and did not do so until June 2007. Once mother finally contacted the regional center, she received an assessment from that agency well before the six-month review hearing. Both her drug treatment program and her parenting education were then adapted to take her special needs into account.

We agree with the Department that factually, this case is more like *In re Misako R.* (1991) 2 Cal.App.4th 538. In that case, services appropriate to the mother's mental limitations and language difficulties were offered, but the mother was resistant to accepting them. Here, as in *In re Misako R.*, "mother was provided with the assistance of numerous people and agencies" (*id.* at p. 547), including four periods of family maintenance services before the dependency petition was even filed, as well as the panoply of services offered during the reunification period. Much, though not all, of the delay in providing those services was due to mother's resistance to accepting them.

Thus, as the court did in *In re Misako R.*, *supra*, 2 Cal.App.4th 538, we conclude that the services provided were reasonable under the circumstances, even given mother's special needs. As the court remarked in that case, "[t]he standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances." (*Id.* at p. 547.) Accordingly, it is not

reasonably probable that a writ petition filed after the section 366.26 hearing was set would have been granted on the ground that reasonable services had not been provided.

2. Sufficiency of Evidence That Return Would Be Detrimental

Mother also contends that substantial evidence did not support the trial court's finding, at the 12-month review hearing, that returning minors to her would create a substantial risk of detriment to them (the detriment finding). Mother characterizes the detriment finding as having been based almost entirely on two facts: her insufficient progress in parenting education, as illustrated by her inappropriate remark to minors about adoption, and her residence with grandmother, which was not stable housing.

This mischaracterizes the basis the court gave for its finding, which was made after a consideration of the entire history of the case, as reflected in the court's file. In fact, mother's progress in meeting the objectives of her case plan was deficient in several additional respects. As of the date of the 12-month review hearing, there was only one area—substance abuse—in which mother had really succeeded in addressing the problems that led to the initiation of the dependency proceedings. She still did not have stable employment. She still was inconsistent about keeping the social worker informed of her circumstances, and about keeping appointments for services.

More importantly, mother's mental health remained an area of major concern. She was not taking her antipsychotic medication consistently, and was still delusional on occasion. She was attending therapy more regularly, but still had not been able to develop a therapeutic relationship with her counselor, and had made little or no progress as a result. In addition, her inappropriate remark about adoption was not the only evidence that her parenting skills remained deficient. Her visits still needed to be supervised because of her trouble keeping both minors safe at the same time, and she still had trouble setting limits and disciplining inappropriate behavior.

Mother cites two cases in which appellate courts overturned a finding that return of a dependent child to his or her parent would be detrimental, where the finding was based solely or primarily on the fact that the parent lived in shared housing with relatives. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768; *In re Danielle M.* (1989) 215

Cal.App.3d 1267.) Both of those cases are distinguishable. Here, grandmother herself had been shown to have poor parenting skills, and her housing situation was extremely unstable. Thus, mother's housing situation was unsuitable not simply because it was shared, but because it was shared with a relative whose own history and circumstances posed a risk of detriment to minors. In addition, mother's housing situation was not the sole factor underlying the juvenile court's detriment finding; indeed, it was not even the most important.

In light of the overall record, we do not see any reasonable likelihood that a writ petition alleging insufficiency of the evidence to support the detriment finding would have been successful. As a result, even assuming for the sake of argument that mother received ineffective assistance due to her counsel's failure to file such a petition, counsel's shortcoming was not prejudicial, and therefore is not a basis to overturn the order from which this appeal was taken.[5]

B. Denial of Section 388 Petition

Mother contends that the juvenile court erred in denying her section 388 petition without an evidentiary hearing. As mother acknowledges, in order to be entitled to an evidentiary hearing on a section 388 petition, the parent seeking to modify the court's order must demonstrate that both (1) there has been a change of circumstances or that new evidence is available, and (2) the proposed change may promote the minor's best interests. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

"[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The

[5] Because we conclude that mother has not demonstrated prejudice from her counsel's failure to file a writ petition, we need not address the Department's argument that by failing to raise the issue earlier, mother forfeited her right to contest the order setting the section 366.26 hearing. For the same reason, we do not reach the issue whether counsel's performance fell short of the applicable standard of competence. We note, however, that the Department's forfeiture argument may be bolstered, and mother's ineffective assistance argument may be undercut, by the fact that at the 12-month review hearing, mother expressly waived her right to contest the Department's report.

prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The standard of review of an order denying a section 388 petition, with or without a hearing, is abuse of discretion, and "[t]he denial of a section 388 motion rarely merits reversal as an abuse of discretion. [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

In the present case, as the Department points out, the only change of circumstances or new evidence alleged in mother's section 388 petition was her having obtained a full-time job, which, as of the date the petition was denied, she held for only a month, after a lengthy period outside the workforce. Mother's living situation, sobriety, and support system had not changed since the 12-month review hearing. She asserted that she had been able to apply the skills she had learned from her parenting instructors, but most of her parenting instruction had taken place before her services were terminated. She also asserted that she had improved her compliance with her psychotropic medication regime. Given her past history of resistance to taking her medication and failure to progress in psychotherapy, however, a short history of improved compliance with her medication was not particularly promising, even setting aside the Department's evidence that mother still suffered from delusions. In short, mother's prima facie showing of changed circumstances was not sufficient to convince us that the juvenile court judge's denial of the petition without a hearing was an abuse of discretion.

More significantly, mother provided no evidence whatsoever that the proposed change would be in the best interests of brother, and as to sister, alleged only that she could help sister with her shyness based on her own experience as a shy child. As to this one issue, the juvenile court judge double-checked his own decision by asking mother, while she was testifying at the section 366.26 hearing, what she was doing to help sister overcome her shyness. Mother could point to nothing she was doing other than encouraging her daughter to approach other children in the park and ask them to play. When asked whether aunt and uncle were doing the same thing, mother said she did not

know. After considering this evidence, the juvenile court judge reaffirmed his decision to deny the section 388 petition.

"[T]there is a rebuttable presumption that, in the absence of continuing reunification services, stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers. [Citation.] To rebut that presumption, a parent must make some factual showing that the best interests of the child would be served by modification." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465.) Mother's section 388 petition made no showing on this point at all as to brother, and as to sister, her allegation was weak to begin with, and was undercut by her own testimony at the section 366.26 hearing. Accordingly, we find no abuse of discretion in the juvenile court's denial of her section 388 petition without an evidentiary hearing.

C. Termination of Parental Rights

At a section 366.26 hearing, when reunification services have been terminated and adoption is likely, parental rights must be terminated unless the objecting parent satisfies the burden of proving that termination of parental rights would be detrimental to the minors under one of the exceptions listed in section 366.26, subdivision (c). (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) In the present case, there was and is no dispute that the minors were adoptable, and a suitable adoptive placement had been found for them. Mother asserted in the juvenile court, however, and reiterates on appeal, that her parental rights should not be terminated because the statutory beneficial relationship exception applies. (Section 366.26, subd. (c)(1)(B)(i) [parental rights not to be terminated when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."].)

On appeal from an order terminating parental rights, "[w]e determine whether there is substantial evidence to support the [juvenile] court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. [Citation.] If the court's ruling is supported by substantial evidence, the reviewing court must affirm the court's rejection

of the exceptions to termination of parental rights under section 366.26, subdivision (c). [Citation.]" (*In re S.B., supra,* 164 Cal.App.4th at pp. 297-298.)

In order for the beneficial relationship to apply, the objecting parent bears the burden of proving that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) In other words, the burden is on the parent to show that the parent-child relationship is such that the child will be *greatly* harmed by the termination of the parent's parental rights, so that the presumption in favor of adoption is overcome. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853-854.) Implicit in this standard is that "a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one. [Citations.]" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350, original italics.)

In the present case, the Department does not dispute that mother visited minors regularly, and the juvenile court acknowledged that she had a positive connection with them. What mother has not shown, however—as her counsel admitted at the section 366.26 hearing—is that her parental relationship with minors is so beneficial to them as to outweigh the benefits to them from gaining a permanent adoptive home. The juvenile court found to the contrary, and mother has failed to show that this finding is not supported by substantial evidence. On the contrary, the court's ruling is strongly supported by the fact that when mother's visitations were reduced from weekly to monthly, minors did not ask for more contact with her.

Relying on *In re S.B., supra,* 164 Cal.App.4th 289, mother argues that the beneficial relationship exception does not require the parent to establish that the child's primary attachment is to the parent. But that was not the test applied by the juvenile court in reaching the result here. On the contrary, the court expressly stated the test it was applying was that minors' relationship with mother was "not beneficial to the point that it outweighs all of the benefits that flow from adoption." This is the correct test under the case law, and mother does not argue otherwise.

In addition, the facts here are sharply distinguishable from those in *In re S.B.*, *supra*, 164 Cal.App.4th 289. In that case, the social worker and bonding study expert both opined that terminating the father's parental rights would be detrimental to the minor. The minor was unhappy when her visits with father ended; missed him when they were not together; and told him she wished she lived with him. (*Id.* at p. 298.) That record "fully support[ed] the conclusion [that father had] continued the significant parent-child relationship despite the lack of day-to-day contact with [his daughter] after she was removed from his care." (*Id.* at p. 299, italics omitted.) The record in the present case does not support the same conclusion.

Mother also stresses the colloquy between the parties' counsel and the juvenile court regarding how mother's relationship with minors would be handled in the future. But the thrust of that colloquy was not, as mother argues, a desire to preserve mother's beneficial relationship. The issue came up because the Department's counsel was concerned that mother would continue to try to visit the children at school even after her parental rights had been terminated. The judge then explained to mother that it was important that her contact with minors be limited to what was allowed by the social worker, and, after the adoption, by the adoptive parents. In that context, mother's counsel suggested that arrangements for further supervised visitation be explored, and the judge responded that it would be in minors' best interests to have a "team meeting" to develop a plan regarding how mother's future involvement in minors' lives would be handled. Thus, taken in context, the judge's remarks about mother's having continuing contact with minors did not reflect a finding that it would be significantly beneficial to the minors for her to do so. Rather, they reflected a recognition of the reality, as noted by minors' counsel, that the adoptive parents were mother's family members, so that contact at "family gatherings" was likely to occur. Thus, the court was properly concerned to ensure that such encounters went as smoothly as possible.

In sum, the beneficial relationship exception "does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during

periods of visitation with the parent." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1348.) Under the applicable standard of review, we find no basis to overturn the juvenile court's order.

DISPOSITION

The order terminating mother's parental rights is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

_____
RIVERA, J.